Supreme Court, U.S.
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No. 98-921

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CYNTHIA F. NORDSTROM,

Petitioner,

v.

PETER J. NORDSTROM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF TEXAS

REPLY BRIEF FOR PETITIONER

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PETITIONER'S RESUBMISSION OF QUESTION PRESENTED NUMBER TWO

II. WHETHER THE PETITIONER'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION HAVE BEEN VIOLATED BY: (1) WHETHER ASSESSING THE ATTORNEY'S FEES OF THE ABSENT FATHER AGAINST THE CUSTODIAL MOTHER REPRESENTS A REASONABLE STATE INTEREST, OR GOES SO FAR AS TO DENY THE PETITIONER'S RIGHTS TO THE BENEFIT OF THE LAWS ENACTED TO BENEFIT HER, AND DENIES HER ACCESS TO THE JUDICIAL SYSTEM; OR IS UNLAWFUL IN THAT IT EFFECTIVELY REDUCES CHILD SUPPORT; OR (2) WHETHER THE FEDERAL MANDATE OF 42 U.S.C. §667, WHICH REQUIRES THE STATE COURTS TO IMPLEMENT THE LAW IS UNENFORCEABLE, AND HAS RESULTED IN THE DENIAL OF HER OPPORTUNITY TO RECEIVE AN AWARD OF CHILD SUPPORT BASED ON FEDERAL AND STATE MANDATED CHILD SUPPORT GUIDELINES.

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*Due to a post office error, Petitioner was not aware that Respondent had filed his Brief In Opposition in this case until February 4, 1999, when she was called by his printer from Omaha, Nebraska. She obtained a copy of the reply from the Supreme Court Clerk's office the next day.

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REPLY BRIEF FOR PETITIONER

Respondent complains that Petitioner should have raised her constitutional claims at the state court level. Petitioner raised her claims there, but could not have anticipated the assault on the child support statutes in the state courts. Twenty-five percent of the children in this country live in poverty. Almost all of them are in homes headed by single mothers – and, contrary to unfair stereotypes, they are mostly white divorced or separated mothers. Congress' effort to address this terrible situation was to bolster and mandate better child support laws on a state by state basis. This approach is unenforceable.

Despite Respondent's claims that Petitioner is bound by state court findings, not one single state court judge has found the proven facts of the record in a statement as required by the Texas Family Code. Not one state court judge will address the issues in this case squarely. Not one state court judge will apply the law. The findings of the trial court and the decision by the First Court of Appeals in *Nordstrom* are state actions that deliberately violate and frustrate federal law and intent. These state actions are void under the constitutional laws of federal supremacy and federal supersession. Petitioner's right to equal protection and due process have also been violated by the assignment of attorney fees against her, and the unenforceability of 42 U.S.C. §667 (1994), as described below.

Needs of the Child, Additional Needs and the Delaware Melson Theory –

(1) Congress and Office of Child Support Enforcement (OCSE) regulations directed that child support should be based on the actual costs of raising a child.

(2) The OCSE provided several basic child support models to the states, including the Delaware Melson theory.

(3) Texas adopted a variation of the Delaware Melson theory for obligor incomes of over $6,000 a month in §154.126, of which this case is one. The higher income obligor is assigned a threshold amount from a chart for lower income obligors [here, $1200 which is 20% of a $6,000 monthly net income in §154.125]. The remaining needs of the child are allocated according to the "circumstances" of the parents. These circumstances are 3:1 in favor of Respondent.

(4) Petitioner, through extensive evidence, cross examination and testimony proved the needs of the child for the year of 1995, in a manner consistent with all reported recent cases in Texas.

(5) The trial court picked and chose the child's "needs", eliminating many whole categories of support. This produced an artificially reduced "need" figure.

(6) The magistrate and the trial court failed to make any actual finding of the financial needs of the child.

(7) The magistrate and trial court awarded only the statutory minimum from the chart, which represents less than 8 percent of Respondent's U.S. based income. This avoided the application of §154.126(b) which provides for additional needs of the child.

(8) The First Court of Appeals held that the trial court judge does not need to make any finding of the actual needs of the child, and does not need to give any explanation for this failure. This is in complete defiance of federal intent.

(9) The First Court of Appeals went even further in two respects. It declared §154.126(b) to be completely optional by the trial court judge. Along with the magistrate and the trial court, it also miscontrued the construc-

tion of the statute. The First Court of Appeals took 20% of the obligee/mother's net income, added the $1200 minimum for the obligor/father, and declared this sum to be more than sufficient to cover the "reduced need" figure produced by the pick and choose method of the trial court.

The real effect of this holding is to limit child support award for higher income obligors to a minimum mandatory figure found on a percentage chart for lower income obligors. If Respondent had a lower income, he would pay a mandatory 20%, not 8% as ordered in this case. The magistrate, trial court and the First Court of Appeals have assigned the additional needs of the child entirely to the mother. This is an allocation of two thirds of the needs of the child assessed to the custodial mother who has one-third of the income and resources of the absent father – a continuation of what she has paid for years.

Income of Respondent –

(1) Congress and OCSE regulations require that child support be calculated based on all of the income of the absent parent.

(2) Numerous Texas statutes track the OCSE Federal Handbook almost word for word, and require that all sources of income be used to calculate child support. Pet. for Writ, App. at 39a-42a, and Lodging A.

(3) There is solid proof in the record that Respondent's reported income was $238,980.39 in 1995. Pet. for Writ App. at 84a. Respondent's deferred and many other sources of income were also abundant in the record.

(4) The magistrate refused to find all of Respondent's income. Finding number 4 states: the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is 20% of the first $6000 of the obligor's net monthly resources. Pet. for Writ, App. at 5a.

(5) In the trial *de novo,* the trial court used a figure derived from the net tax income shown in Respondent's 1994 income tax records, and specifically excluded Respondent's deferred income over the objection of Ms. Detamore. Pet. for Writ, App. at 65a.

(6) The First Court of Appeals avoided the issue (which was argued in Petitioner's brief) claiming that Petitioner had waived it.

Respondent argues that the state court has made a finding of Respondent's income which cannot be disturbed. The issue is whether the trial court followed the requirements of Congress, the federal government, and the Texas Family Code to include the appropriate items of income in its calculation of the obligor's income. As Congress properly understood and directed, child support cannot be fairly assessed unless all of the income of the absent parent is used in the calculation. The courts have deliberately evaded these federal and state requirements.

Federal and state mandated add-ons and "lifestyle" –

(1) The OCSE specifically included an extensive series of mandatory add-ons and deductions in its Federal Handbook for states to implement by statute.

(2) In Texas, they translated into §154.123 (other factors to consider).

(3) The Federal Handbook and the Delaware Melson theory specifically intend children to benefit from the income of their parents. Petitioner noted this in her Petition.

(4) In the 1993 revisions to the Texas Family Code, the legislature intentionally overruled *Rodriguez v. Rodriguez,* 860 S.W.2d 414 (Tex. 1993), which had specifically removed lifestyle considerations from the child support calculation. Despite Respondent's and the First Court

of Appeal's contentions, *Rodriguez* has been overruled twice by the 1993 and 1995 revisions to the Texas Family Code. *Zajac v. Penkava,* 924 S.W.2d 405 at 409, (Tex. App.-San Antonio, 1996, no writ), correctly held:

> The references to ability to pay and lifestyle which had been omitted in a prior recodification have now been superseded by the legislature in the 1993 amendments. The trial court is now affirmatively directed to consider the income and circumstances of the parties. We must assume the Legislature intended exactly what it said.

(5) In a footnote in *Nordstrom,* the First Court of Appeals has completely eliminated the mandatory add-ons and lifestyle considerations from the child support calculation, by stating that the language of §154.126(b) requiring the trial court to consider the "income of the parties" and "proven needs of the child" to address the additional needs of the child are the **only** "factors to be considered in awarding additional support." The utilization of the §154.123(b) factors is spotty in Texas. Petitioner has found two cases. *Ikard v. Ikard,* 819 S.W.2d 644 at 649 (Tex. App. – El Paso, 1991, no writ), stated, "That section requires the court to consider all relevant factors." *Zajac v. Penkava* also applied the factors where the total resources of the obligor exceeded $6,000. *Id.*

Retroactive Child Support –

(1) In OCSE action transmittals, OCSE-AT-93-04, Collection of Unreimbursed Assistance, and OCSE-AT-93-08, Use of Presumptive Child Support Guidelines process for Establishment of Support Awards/Collection of Unreimbursed Assistance, Lodging C, the OCSE authorized state IV-D programs to collect retroactive child support based on the guidelines back to the time of filing of the suit for modification.

(2) As Petitioner has shown in her Petition, Texas modified its laws to require mandatory retroactive child support back to the time of filing of a suit for modification to be consistent with that Federal intent. It is not limited to IV-D situations.

(3) The trial court denied retroactive child support.

(4) Contrary to statutes and a Texas Supreme Court case, the First Court of Appeals declared retroactive child support to be optional, and added an additional factor that is not in the statute, requiring Petitioner to show "need" for retroactive child support.

Respondent has avoided the substantive issues –

In his reply brief, Respondent begins with an approach that has been very successful for him in Texas courts: the attack on and denigration of the character of the mother, by objecting to her use of her maiden name for professional reasons.[1] Throughout the trial, Petitioner's credibility was never an issue, partly because she provided so much documentation, tabulation and proof of her expenses, and withstood vigorous cross-examination. Respondent is attempting to bootstrap his strategy into an issue. This is because he doesn't have the facts and he doesn't have the law. Neither did the First Court of Appeals.

Respondent has mischaracterized the facts by claiming that Petitioner lost the case. Petitioner actually pre-

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[1] It is immediately evident that Cynthia F. Nordstrom, Petitioner, and Cynthia A. Frey, counsel of record, are the same person. Petitioner has never hidden her identity. The only way Petitioner can afford to bring this case to this level is to write the brief herself. In a recently televised interview with Roger Mudd, Mr. Chief Justice Rehnquist described the operation of the Supreme Court, and explained why, "we do our own work." Petitioner feels that he would understand her present position as a little red hen. Petitioner has knocked on every door. She has received a great deal of empathy, but that's about all. Donna J. Detamore, who has practiced family law exclusively in the Texas state courts for

[footnote continued]

vailed. The trial court specifically found a change in circumstances necessary to justify a modification of child support. This is a threshold requirment for an increase, which Petitioner did receive, albeit a small amount.

Respondent claims that Petitioner has no standing, claiming that federal mandates are only applicable to Texas' child support guidelines as they apply to section IV-D (welfare) cases. Congress specifically intended that one set of child support guidelines apply to every child support case, whether IV-D or not. There is no question about this. Lodging B, p. 14 of 36.

Respondent claims that Petitioner would have the court review the entire record. This is not the case. Petitioner brings specific and detailed issues presented properly before the court, and is not requesting any general review of the record. Respondent also claims that this is a frivolous petition, arguing that these are state law issues, citing a letter from the Department of Health and Human Services. The letter highlights the critical need for this Court to hear this case, as discussed below.

Petitioner's right to equal protection and due process –

There is a distinct line of decisions from the United States Supreme Court that are applicable to family law cases. In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court

> recognized a narrow category of cases in which the State must provide access to its judicial processes, without regard to a party's ability to pay court fees. [citing *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971)] . . . the Court has consistently set apart

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twenty years, is lead counsel. Ms. Detamore, an accomplished and seasoned litigator, will be available to present oral argument, explain to this Court how child support modifications are actually handled, answer any questions, and describe the realities faced by single mothers and children in the courts of the State of Texas.

> from the mine run of civil cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion. . . ." [citations omitted]

In *Boddie v. Connecticut,* the court found a $60 fee which prevented indigent appellants from obtaining a divorce to be a violation of their rights to due process. The "government interest" involved in this case concerns the court's use of fees and costs to allocate scarce judicial resources – balanced against the rights of Petitioner, the custodial mother. In this case the state court has gone too far. The assessment of attorney's fees against her was a punishment, a reduction in child support and an effort to discourage her appeal.

The assignment of attorney's fees of the absent father against the custodial mother is the most reprehensible part of this case. This holding flies in the face of all precedent and previous law in Texas. The chilling effect is of the greatest magnitude. The fear of being assessed an absent father's attorney's fees will keep thousands of single mothers out of the family courts.

In Texas, attorney's fees can be taxed as costs, § 106.-002. Attorney's fees are actually considered child support in Texas in enforcement proceedings and failure to pay them is punishable by a contempt action separate from a contempt action for failure to pay monthly child support. Although the trial court awarded a $200 a month increase, it reduced child support by assessing the absent father's attorney's fees against the custodial mother. In essence, the trial court has ordered child support payments by the custodial mother to be paid to the non-cus-

todial father. By upholding this award, the First Court of Appeals completely negates the purpose of the child support guidelines. Petitioner moves for an award for all of attorney's fees (taxed as costs) and costs of this case pursuant to Supreme Court Rules 42 and §106.002 of the Texas Family Code.

Federal law has been ignored by the Texas courts –

Petitioner's right to due process also involves a substantive expectation that she would receive the benefit of child support determined pursuant to the statutes in the 1995 Revisions to the Texas Family Code. Her expectation was not only due to the existence of those state statutes, but it was also premised on the requirement in 42 U.S.C. §667 (1994) that those child support guidelines were mandatory in state courts. The state courts have denied her the benefit of the laws written to financially assist her and her daughter. In fact, her efforts to avail herself of them has harmed her greatly. She is in a much worse position than when she started the process in 1994.

The letter from Health and Human Services is not controlling in this case, but it does illustrate the dichotomy between Congress' intent and reality. After passage of the Family Support Act of 1988, the Child Support Project was contracted out by the OCSE to the American Bar Association Family Law Division in Washington, D.C., to delineate federal intent, and assist the states in enacting child support laws consistent with federal methodologies, as shown in the Federal Handbook.

Congress made the new rules mandatory as to state courts in a 1989 amendment of 42 U.S.C. §667 (1994). Lodging B, p. 4 of 36. When the Child Support Project was complete, and the ABA lawyers left the OCSE, the OCSE dropped its tools. The federal strategy of mandating new rules for state court judges doesn't work. As the

Health and Human Services letter clearly illustrates, there is no remedy if state courts refuse to follow the guidelines. There is no remedy if a state court destroys an entire statutory scheme for child support.

The extraordinary costs to raise a child are well known and well published – but as §1-3 of Child Support Guidelines: interpretation and application, Aspen Law and Business, 1996, points out, most child support obligations are less than the absent father's monthly car payment. For Petitioner, a federal law which requires the cooperation of state court judges, but is entirely unenforceable, is a hollow promise.

PRAYER

The unconstitutional holdings in *Nordstrom* harm not only Petitioner and her daughter, but many other single mothers and their children in the State of Texas. Petitioner and her daughter have been denied the equal protection and due process of laws intended to benefit them.

Few single mothers have the persistence, knowledge or ability to raise a family law case to this level. Unpaid and underpaid child support runs into the tens of millions. Investment in the next generation is a national concern. It is important for the Court to decide a case where all of the major issues in child support are involved. Therefore, for the reasons stated above, and in Petitioner's Petition for Writ of Certiorari, Petitioner prays that this Court will grant her petition and hear this case.

Respectfully submitted,

DONNA J. DETAMORE
CYNTHIA A. FREY